82-280

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES H. SYLVAIN, PETITIONER

V.

ESTATE OF EUDORE J. SYLVAIN, ET AL

ON APPEAL FROM THE SUPREME COURT OF

NEW HAMPSHIRE

CHARLES H. SYLVAIN
526 CABOT STREET
BEVERLY, MA 01915
617/922-8177

Questions Presented

1. The main question before this Court is the denial of due process in all its facets as delineated by the lower Court's procedures of the recognition with effect of due process as described by the lower Court's rulings and actions, and for some examples, the lower Court's rulings and actions that make a plea of abatement and a special appearance impotent on their face, that disregards case law in New Hampshire in reference to a continuance in a special appearance situation, that continues the Court's hearing with one party, the adversary in attendance, and even more, files an interlocutory decree in this depicted situation when only one party is under jurisdiction, thereby denying this petitioner to be heard and to defend in any hearing or setting when petitioner has had sufficient time to prepare and defend against said

executrix's petition. Due process reference is the fifth and fourteenth amendments to the United States Constitution.

2. The disregard for full implementations of New Hampshire statutes, a denial of equal protection of the laws, reference fourteenth amendment to the United States Constitution.

3. Whether a lower Court can discriminate in this fashion as delineated in this petition and get away with it, or does our Constitution have sufficient teeth and strength that such prejudicial rulings and actions will not be tolerated.

4. Does this Court have the will to innovate if necessary because of a Probate setting to reverse such intolerable and uncompromising action by the lower Court.

5. Does the Probate Judge have the power to issue an interlocutory decree when only one party, the adversary, is under the jurisdiction of the Court.

6. Whether the Court below applied the proper standards of proof for its rulings issued in said decrees.

7. From all the above questions and their related presumptions was this petitioner deprived of due process of law as delineated in this writ of certiorari.

8. From all the appropriate questions above and their related presumptions was this petitioner deprived of the equal protection of the laws as delineated in this writ of certiorari.

List of Parties

In addition to the Executrix, Priscilla S. Henderson, by motion the other party will be The Honorable Gary R. Cassavechia of the Probate Court, Strafford County, Dover, New Hampshire, by leave of Court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

CHARLES H. SYLVAIN, PETITIONER

V.

ESTATE OF EUDORE J. SYLVAIN, ET AL

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

Charles H. Sylvain petitions for a writ of certiorari to review the decrees of Strafford County Probate Court of Dover, New Hampshire in this case.

Opinions Below

The opinions of the New Hampshire Supreme Court and the decrees of the Strafford County Probate Court are not reported. All of these opinions are reprinted in the appendix hereto beginning at page A1.

Jurisdiction

The decrees of the Strafford County

Probate Court of Dover, New Hampshire were entered on 12/15/81 for the hearing of 10/28/81 on the executrix's petition and on 2/4/82 for the hearing held on 1/26/82 on the Fourth and Final Account. A notice of appeal to the New Hampshire Supreme Court was filed on 3/5/82 which on 3/23/82 the Court ruled decision below is summarily affirmed. An untimely motion to suspend the rules for a rehearing was submitted to the N.H. Supreme Court on 4/15/82 and reconsideration was denied on 4/22/82. Improvidently a petition was filed in Federal District Court For the District of New Hampshire on 4/16/82 and was dismissed on 5/21/82. Jurisdiction of this Court is invoked under 28USC #1257(3) since the decrees of the Probate Court have infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States. By Order dated 6/18/82 Justice Brennan

granted petitioner an extension of time in which to file a petition for a writ of certiorari to and including 8/20/82.

Because the New Hampshire Supreme Court did not fully review the Probate Court's decrees but ruled summarily on the petitioner's notice of appeal and where state law permits no other recourse for review, certiorari must be issued to the Probate Court. A state court may not omit decisions on federal questions and thus defeat the jurisdiction of the United States Supreme Court, Wolf V State of North Carolina, 364 US 177, 80 S Ct 1482, 4 (L Ed 2d) 1650, (1960) rehearing denied 364 US 856, 81 S Ct 29, 5 (L Ed 2d) 80. Because the Probate Court did not have jurisdiction in any manner over this petitioner at the hearing of 10/28/81 and a continuance by petitioner at proceeding would have waived special appearance but said Court issued an interlocutory decree

anyway with only one party with jurisdiction, and optioned in its decree quote " That pending hearing upon the Executrix's Fourth and Final Account further ruling upon Executrix's petition filed 9/1/81 is reserved. That while the hearing to be scheduled upon filing of the Executrix's Fourth and Final Account shall be limited in its scope to consideration of the account alone, after hearing the Court shall make such order regarding the allowance or disallowance of said account and such further order regarding the Executrix's petition filed 9/1/81 as is found appropriate," unquote. This petitioner notwithstanding the above quote of decree of 12/15/81 at hearing for Fourth and Final Account, petitioner tested repeatedly the discretion of the Court to be heard on the merits on petition of executrix dated 9/1/81 and offered evidence to defend but all such endeavors

were denied. Your petitioner, Charles H. Sylvain claims that denial to be heard and properly defend against the executrix's petition deprives him of his liberty and property without due process of law in violation of the fifth and fourteenth amendments to the United States Constitution and also the denial of the equal protection of the laws in violation of the 14th Amendment to the United States Constitution.

The New Hampshire Supreme Court ruled summarily meaning "no substantial question is presented" despite the fact that serious Federal due process questions have been raised. Certainly this petitioner stresses with emphasis that nonfederal grounds are without any fair or substantial support.

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the Constitution of the United States provides in

pertinent part as follows: "nor be deprived of life, liberty or property without due process of law" ***.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part in the first section as follows: "nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC #1983 Civil action for deprivation of rights provides every person who under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity or other proper proceeding for redress.

Rule 25 of the New Hampshire Supreme Court provides in pertinent part as follows. "The Supreme Court may at any time, on its own motion and without notice or on such notice as it may order, dispose of a case summarily, if the Court lacks jurisdiction or no substantial question is presented" ***.

New Hampshire Supreme Court statute RSA 490:14-a provides penalties for frivolous appeals. If upon the hearing of any appeal, reserved case or bill of exceptions; it clearly appears that the appeal, reserved case or bill of exceptions is frivolous; immaterial or intended for delay, then the court, upon motion of a party or its own motion, may award against the moving party double the amount of the costs incurred by the prevailing party beginning with the entry of the appeal,

reserved case or bill of exceptions, and also interest at the rate of twelve percent per annum on any amount which has been previously found due or for which a verdict has been recovered or which the moving party has been ordered to pay.

New Hampshire Probate Statutes provide as follows: RSA 550:5 Citation to Parties Interested. In all cases in which notice is required a citation shall be issued, or an order of notice made to the parties interested, to appear at the court at a day and place therein appointed, that they may be heard if they see cause.

RSA 554:8 Accountability for Stocks, etc. All stocks and bonds shall be accounted for by the administrator at the prices which they shall bring at a public or private sale; and the administrator conducting the sale with fidelity and impartiality shall be credited with the loss, or charged with the gain, upon the sale.

564:14 Authority to Sell, etc. The judge, on application of a trustee or of any person interested, may, after notice to all persons interested, authorize and require the trustee to sell any property holden in trust, and to invest the proceeds of the sale in such manner as will be most for the interest of all persons concerned therein; and the judge may, from time to time, make such orders and decrees as he may think just and reasonable, in relation to the sale, management, investment, and disposition of the trust property and the settlement of the account of the trustee.

554:25 Account. The account of the administrator, or the schedules filed therewith, shall contain an itemized account of every sum of money received and paid out by the administrator, with the date thereof and a statement of the source from which it was received or of the con-

sideration for which it was paid.

New Hampshire Probate Statutes provides in pertinent parts as follows: RSA 561:10 Unclaimed Share. Whenever, upon a decree of distribution or the settlement of the account of an administrator, executor or trustee, there shall be in his hands any sum of money *** belonging to any heir *** or if such person shall refuse to accept or receipt for such sum after being tendered, the administrator, executor or trustee shall petition the probate court and the court, *** shall decree that the sum be paid over to the state treasurer, and such payment shall be a discharge of said administrator, executor or trustee ***.

567-A:4 Report of Findings and Rulings. The judge of probate by whom a decree, order, appointment, grant or denial was made shall report the material facts found by him and his rulings of law

on request of any party entitled to appeal therefrom made before the entry of such decision ***.

New Hampshire Probate Rules provides:

Rule 4. Time of appearance by attorneys. Any attorney or other duly authorized person who desires to appear to contest or object to any matter in order for hearing, shall enter his appearance in writing and give notice thereof to the opposing party not less than two days before the session of the court at which such hearing is to be had.

Rule 27. Notice of hearing, motion. Unless it appears to the Court that justice shall otherwise require, a fourteen-day notice of any hearing, motion, or other proceeding before the Court, shall be given by the register of probate to parties interested or to their attorneys of record. Such notice, however, may be waived by said parties or attorneys.

New Hampshire Probate Rules provides in pertinent parts as follows: Rule 43. Continuances. *** All cases will be in order for trial on the date and time set by the court and, notwithstanding agreements of counsel, will not be continued or postponed except for good cause shown, and upon such terms as the court may order. *** All requests for continuances or postponements shall be made by written motion setting forth the grounds relied on.

Statement

Eudore J. Sylvain, the testate, my father passed away on 10/24/71. In 1973 in Superior Court the executrix's testimony influenced the Court for the decree against allegations that said will was prepared and executed at a time when the said Eudore J. Sylvain was not of sound and disposing mind and that said instrument was the product of undue influence.

The issue, leaving apartment building to second wife which testate married when E.J. Sylvain was non compos mentes. Besides present malpractice suit against former attorney in 1973 (above suit), for said attorney, officer of the Court, allegedly did not perform requested discovery including medical information and records, which said attorney had written instructions to complete by the petitioner; the attorney and the executrix, officer of the Court are alleged with extrinsic fraud and fraud upon the Court in petition for a new trial, the executrix for her alleged fraudulent testimony in 1973 trial. In 1977 this petitioner alleged that executrix should be acting as trustee and appealed same instigated by selling securities as an executrix instead of trustee (notice required as trustee). In 1980 executrix filed a petition (delineated later). The late Honorable William

E. Galanes, Probate Judge at commencement of this action until his death refrain on acting on these two actions, though on all other occasions ruled immediately and firmly. The executrix again filed similar petition on 9/1/81 praying mainly for cost of administration since 1977 be charged against the petitioner's half of the estate, a partial distribution, conclusion of the administration of the estate, the choice of petitioner to escheat his estate, all because of mainly length of litigation. On one side executrix emphasizes length of litigation, on other side petitioner alleges above fraud which will finally overcome, and in petition and Bill of Discovery for a new trial by plaintiff, executrix was in default for appearance for approximately 19 months, in other words executrix emphasizes litigation and the plaintiff is emphasizing the truth of the matter, and

the incredibility of executrix, an officer of the Court.

On 9/16/81 Register completes an insufficient notice to this petitioner for hearing on petition on 10/28/81. Plaintiff diligently responds, files special appearance dated 9/21/81 and filed a Plea of abatement dated on same date to Quash petition and also requested to be heard if Court did not Quash petition. On 9/29/81 register corrects notice and states hearing will be held on 10/28/81. Probate rule #27 requires 14 day notice. On 10/15/81 plaintiff objected to amended process, objected to no ruling on Plea to Quash, objects to jurisdiction of his person. Plaintiff stated mandatory obligation to protect his rights because of no ruling on plea and was not heard. Therefore plaintiff's responsibility was to research the tenuous position of the maintenance of his special appearance.

Plaintiff was prejudiced and injured because plea of abatement was not a settled matter, and no positive determination could be assumed by the plaintiff to consider the merits of adversary's petition for under the circumstances Plea of abatement was the only matter properly before the Court, besides time did not allow to research the Plea of abatement and also the merits of said petition because remedies were different now to this petition in deference to a similar petition which had been filed on 2/13/80 and petition was extremely long. Case law in New Hampshire is well settled that an objection to service or notice is waived when a party by general appearance or otherwise submits any other question except to the sufficiency or notice to the court. See Lyford et al V Trustees of Berwick Academy 83 A2d 302, 97 NH 167, 31 ALR2d 258 (1951). This petitioner did

not request a continuance and waive, but maintained his special appearance. This petitioner also maintained his special appearance by objecting to amended process which was mandatory to maintain special appearance.

Though Court said plaintiff could remain and defend petition and maintain his above status plaintiff said he needed more time and was unprepared to defend petition. No consensus could be agreed upon by the parties so the plaintiff left the Courtroom and the Court continued with one party on the merits and (1) at no time did the Probate Court have jurisdiction in any manner over this petitioner at the 10/28/81 hearing, though Court issued decree with only one party with jurisdiction, (2) by the interlocutory decree of 12/15/81, and (3) the final denials of the Court at the 1/26/82 hearing to allow petitioner to be heard

and defend against said executrix's petition, by Court procedure this plaintiff was denied due process and equal protection of the laws, fifth and fourteenth amendments of the United States Constitution, a substantial federal question, which by procedure the Probate Court omitted decision on federal questions and thus defeated the jurisdiction of the United States Supreme Court by putting forward nonfederal grounds of decision which are without any fair or substantial support, Wolfe V State of North Carolina 364 US 177, supra, and which the late experienced Honorable William E. Galanes, Probate Judge for years who knew and respected the history of said matter would not even rule upon it and in contrast we have the Honorable Gary R. Cassavechia by his motivations seemed not to appreciate the high values of our constitution, the values of fairness and the accurate account

of said history of said matter presented to the Court so that from these considerable supplementary pleadings, fairness of the truth could be attained, even if it was only the initial hearing of this matter before him. But at the 10/28/81 hearing plaintiff maintained his special appearance by at the first opportunity by arguing that the Court did not have jurisdiction over this petitioner by arguing the merits of a Plea of abatement and special appearance, by informing the Court of the dilemma of time that developed as delineated above and that a motion for continuance would have waived his special appearance. That said present hearing of 10/28/81 be ended to allow this petitioner ample time to defend against said petition see Clough V Moore, 63 NH 111, 112, and that these matters including a ruling on the Plea of Abatement were properly officially the only

matters before the Court. These matters were briefed before the hearing so that the position of this petitioner could be known to the Court so that no error of law or fact could occur. All positions of this petitioner were denied whereupon he objected and excepted. Petitioner maintained the protective necessary embracement of a special appearance status while at the hearing.

Probate Court established law of the case by actions and reserved ruling on petition of 9/1/81 per interlocutory decree of 12/15/81 and ruled on said petition per interlocutory decree of 12/15/81 after hearing for fourth and final account on 1/26/82 and decree of same date. At the 1/26/82 fourth and final account hearing this petitioner because of the Court's ruling ambiguities had pleaded after 12/15/81 decree appealed to the discretion of the Court, repeatedly

to be heard and to defend against said petition but all endeavors were denied. A denial of due process and equal protection of the laws per the fifth and fourteenth amendments to the United States Constitution is demonstrated throughout both hearings.

The Court continued its prejudicial mode and insensitiveness to the overall facts of this case, and even with a celebrated effort by the plaintiff, the endeavor fell on deaf ears.

Relative to said executrix's petition of 9/1/81 as well as to said Fourth and Final Account where proof of account was denied to plaintiff to accomplish for its Court's responsibility to have executrix or her attorney prove the account in the acceptable manner bills, checks, etc., where requested discovery was denied which requested a statutory requirement to the accounting procedure;

denied discretionary request from plaintiff to allow Dr. Gus L. Hoyt to testify only for the sake of proving that necessary litigations over the years were not frivolous, immaterial and intended for delay, denied ruling as whether executrix should have been acting as a trustee in 1977.

Therefore with the alleged fraud, the mental condition of the testate, the incredibility of the executrix, an officer of the Court, and all the adverse colorations of this whole matter, the inherited estate in its present status is not a clean estate, is not a respectable estate, is demeaning in its inbred attributes if not clean it has to be otherwise and therefore is unacceptable therefore escheated.

Ruling to close estate when estate and executrix are still in litigation is preposterous and insensitive to usual needed thereon, also court prejudicially

ruled for petitioner to pay for cost of hearing on Fourth and Final account which is not normal and very very irregular. Also Court did not comply with statute for findings of fact and conclusions of law.

RAISING THE FEDERAL QUESTION

On 9/16/81 register completes insufficient notice to petitioner for hearing on 10/28/81 which lacked executrix's petition of 9/1/81. Dated 9/21/81 petitioner files special appearance, pleaded Plea of abatement to Quash executrix's petition of 9/1/81. Pleaded any other action would bias and prejudice petitioner proper action for defect in process is to Quash - any inherent arrangements of petition made by Court is void where defective service commonly goes to abate proceedings. If Court does not abate desires to be heard. Register on 9/29/81 corrects notice, hearing to be held on 10/28/81.

Probate Court rule #27 requires 14 day notice. Petitioner pleads on 10/15/81 with objection to amended process, pleaded objection (1) no ruling to quash - (2) to jurisdiction of his person - (3) pleaded no positive determination that plea of abatement was a settled matter, therefore dilemma resulted in indefinite condition and designation that matter not settled therefore petitioner was prejudiced and injured for Court did not eliminate plea of abatement from future discussion - that plea of abatement under the circumstances is first order of business and only matter before Court and petitioner will not waive this position. Pleaded with no definite ruling on Plea of abatement responsibility was to research said position of Plea of abatement and not merits of said adversary petition. Case law in New Hampshire is well settled that an objection to service or notice is

waived when a party by general appearance or otherwise submits any other question except to the sufficiency of notice to the Court. Lyford et al V Trustees of Berwick Academy 83 A2d 302, 97 NH 167 31 AL R2d 258 (1951). Petitioner made the Court aware of this New Hampshire case law after interlocutory decree of 12/15/81 which stated that petitioner did not ask for a continuance, but the Court still did not change its position.

With brief and pleadings specifically noting position of this petitioner in Probate Court at the 10/28/81 hearing, this petitioner continued to maintain his special appearance completely during his stay at hearing where this petitioner stated to the Court that in no manner did the Court have any jurisdiction over this petitioner. This petitioner stated the merits of a special appearance and a Plea of abatement, because of no ruling pre-

viuosly requested on plea of abatement that petitioner had to research tenuous position of special appearance without sufficient time to complete research on petition for remedies were different to executrix's latest similar petition. The Court being informed previous to the 10/28/81 hearing that Dr. Gus L. Hoyt would testify against executrix's petition now not probable. Petitioner told Court that 30 days were needed to prepare properly for hearing on petition that plea of abatement was properly officially the only matter before the Court and demanded a ruling on said Plea of abatement that this hearing should be abated and that another hearing be held on the merits of said petition. The Court ruled and denied the plea of abatement and other above requests and this petitioner objected and excepted. Because the Court did not have jurisdiction over the person of this peti-

tioner or in any other manner, because this petitioner was not prepared to defend against said petition, the Court optioned to said petitioner that he could stay and defend and not sacrifice his special appearance, or leave the Court room and since the Court could not from the adversary acquire any remedial solution this petitioner left the Court room with only one party under jurisdiction for hearing on the merits which anyway even under these circumstances the Court filed an interlocutory decree dated 12/15/81 and relative to the petition stated:

5. That pending hearing upon the Executrix's Fourth and Final Account, further ruling upon the Executrix's Petition filed September 1, 1981, is reserved.

6. That while the hearing to be scheduled upon the filing of the Executrix's Fourth and Final Account shall be limited in its scope to consideration of the account

alone, after hearing the Court shall make such order regarding the allowance or disallowance of said account and such further order regarding the Executrix's Petition filed September 1, 1981, as is found appropriate.

It is evident at this point that the procedure of the Court has already denied this petitioner's due process according to the fifth and fourteenth amendments to the United States Constitution. But at the 1/26/82 hearing for the Fourth and Final account this petitioner appealed to the discretion of the Court because of close examination and possible interpretation of the interlocutory decree shown above. Dr. Gus L. Hoyt had been subpoened to testify at the 1/26/82 hearing but all endeavors were denied for the Court ruled that the petition was a settled matter. The Court denied discovery which entailed statute RSA 554:25, actually the account

as presented does not comply with the statute. Though discovery was not allowed some copies of bank books supplied later some of the dates requested. RSA 567-A:4. Requests findings of facts and conclusions of law wherefore the Court did not respond to all requests and mainly the request of being heard and an opportunity of each defendant or petitioner as the case to be to make a defense before judgment is made against said defendant or petitioner. This petitioner objected and excepted if not in court by separate documents on most positions of the Court because of insensitiveness and prejudicial motivations and actions.

Also the Court did not rule on statutes RSA 554:8 and RSA 564:14 which was requested by petitioner to determine if securities when sold should not have been under the laws relative to a trustee.

Plaintiff filed a timely notice of

appeal on 3/5/82 in the New Hampshire Supreme Court presenting according to appeal instructions the denial of being heard and to defend against said executrix's petition of 9/1/81 and the inability to move for a continuance and maintain a special appearance for 10/28/81 hearing. The appeal revealed the rulings of the Court and the objections and exceptions by this petitioner. Also presented to the New Hampshire Supreme Court were the New Hampshire statutes RSA 554:25 Account, RSA 567-A:4 Report of Findings and Rulings, RSA 554:8 Accountability For Stocks and RSA 564:14 Authority to sell, RSA: 550-5. The above (5) statutes were presented to the New Hampshire Supreme Court for the lower Court did not fully comply with the above statutes according to the law which in both instances in lower and Supreme Court was a denial of the equal protection of the law

according to the 14th amendment to the United States Constitution. The petitioner moved that the New Hampshire Supreme Court acquire the pleadings and records of these matters to supplement the notice of appeal, which plaintiff resolved was a necessity for a correct determination, but the Court ruled on notice of appeal without acquiring said pleadings and records and here again the petitioner has been denied the full protection of due process. On 3/23/82 the Court ruled summarily on the Notice of appeal. See appendix Page A1 and A2. Actually there is no concrete delineation of how to present the pleadings to the Court and this petitioner at the time resolved that the motion method was the best approach which it is not, but should be sufficient.

Reasons for Granting Writ

It is evident that the federal question of due process, a question of substance and that the lower Court has decided it in a way probably not in accordance with applicable decisions of this Court. That the Probate Court's procedure where (1) evidently a plea of abatement and special appearance was not recognized to the maximum extent, a Plea in abatement which goes solely to the jurisdiction of the Court is not a general appearance and all defects in the service of a writ which are not apparent on the face of the record are cured by an appearance unless exception is taken to the service by regular plea in abatement, Morse V Calley 5 NH 222, (2) that case law in reference to requesting a continuance combined with a special appearance which would have meant waiver of the special appearance was not recognized, Lyford et

al V Trustees of Berwick Academy 83 A2d 302, 97 NH 167, 31 ALR2d 258 (1951). The law is well settled in this jurisdiction that "an objection to service or notice is waived when a party, by general appearance or otherwise, submits any other question, except the sufficiency of service or notice, to the court or other tribunal." Roberts v. Stark, 47 N.H. 223, 225; Dolber v. Young, 81 N.H. 157, 159, 123 A. 218, and cases cited. See also, Maryland Cas. Co. v. Martin, 88 N.H. 346, 189 A. 162; Nelson v. Morse, 91 N.H. 177, 16 A.2d 61. It is regarded as an "elementary principle that waiver like any question of fact is to be determined upon all the evidence, and is not concluded by the declaration of the party." Dolber v. Young, supra. 81 N.H. 159, 123 A. 219. It is the "character of his acts in praying the consideration of the court," and not the form of the statements which the defendant makes, which

determines the effect of his conduct. The question is whether he has in fact submitted himself to the jurisdiction of the tribunal. Worthen v. Kingsbury, 84 N.H. 304, 308, 149 A. 869; Mauzy V Mauzy, 92 A2d 908, 97 N.H. 514. (3) That the lower Court's recognition of the necessity of having jurisdiction over a person which was not acquired and was just disregarded as not necessary.

A state court may not omit decision on federal questions and thus defeat jurisdiction of the United States Supreme Court by putting forward nonfederal grounds of decision which are without any fair or support, Wolfe V State of North Carolina, 364 US 177, 80 Sct 1482, 4 LED2d 1650, (1960), rehearing denied 364 US 856, 81 Sct 29, 5 LED2d 80. (4) That these Court's procedures were extended to the maximum for only one party was heard on the merits of the executrix's petition and (5) the

Court even filed an interlocutory decree of 12/15/81, (6) and reserved some decisions until it actually did have jurisdiction over this petitioner in the hearing of the Fourth and Final Account on 1/26/82, (7) even though under a special appearance merits of controversy cannot be determined, Chrysler Corp. V Dann, 171 A2d 233.

In Henry V State of Mississippi (1965) 85 Sct 564, 379 US 493 13 LED2d 408; Lowell V City of Grifen (1938), 58 Sct, 666, 668, 303 US 444, 450, 82 LEd 949, we find in these cases that it is reflected that it is always a federal question whether a state procedural ground is adequate, and in Henry V State of Mississippi, supra, whether state's procedural enforcements are worthy or unworthy and ought not be permitted to bar vindication of an important federal right. In Fay V Noia (1963) 83 Sct 822, 372 US 391, 9

LEd2d 837, we find reflections that due process must require more than a fair opportunity to raise constitutional defenses, that state interests were found to be greatly reduced with respects to procedure when state procedure is applied to matters of a federal right. If the basic claim goes to matters of federal right the paramount interest is federal. That the decree of respect for Federal rights by the Probate Court are due to its substantive procedural grounds and in a scale from 0-10 it ranks 0. What we find is that the Probate Court's substantive grounds cannot be honored for they are patently evasive and discriminatory against federal rights, and make burdensome the vindication of federal rights. That state procedure can never be independent of the requirements of due process and it is accordingly clear that courts are obliged to entertain any federal claim. Un-

reasonable procedural requirements cannot be allowed to deny consideration of a claim without the obligation to entertain it. Saunders V Shaw (1917) 37 Sct 638, 244 US 317, 61 LED 1163; In Bowie V City of Columbia (1964) 84 Sct 1697, 1703, 378 US 347, 354-355, 12 LED2d 894. Due process tests have also been employed in cases that center on the failure of a state court to provide remedies for a Federal right, Ward V Board of County Comm'rs of Love County (1920) 40 Sct 419, 253 US 17, 64 LEd 751; Laurence V State Tax Commission of Mississippi (1932) 52 Sct 556 at 558, 286 US 276 at 282-283, 76 LEd 1102. State grounds cannot be found to deny this federal duty (1908) General Oil Co. V Crain 28 Sct 475, 209 US 211, 62 LEd 754. State grounds for decision cannot be allowed to evade or avoid federal rights. Chapman V Goodnow's Adm'r (1887) 8 Sct 211, 215, 123 US 540,

548, 31 LEd 235; Radio Station WOW, Inc. V Johnson (1945) 65 Sct 1475, 1480-1481, 326 US 120, 129, 89 LED 2092; Mullaney V Wilbur (1975) 95 Sct 1881, 1886 and N 11, 421 US 684, 690-691 and N11, 44 LED2d 508. Street V State of New York (1969) 89 Sct 1354, 1361-1362, 394 US 576, at 583-585, 22 LED2d 572. NAACP V State of Alabama ex rel. Flowers (1964) 88 Sct 1302, 1308-1311, 377 US 288, 296-301, 12 LED2d 325. See Brennan State Constitutions and the Protection of Individual rights (1977) 90 Harv L. Rev. 489; 500-501. Williams V State of Georgia (1955) 75 Sct 814 at 819, 349 US 375 at 383, 99 LED 1611.

State remedial grounds cannot be inadequate to support denial of any remedy, Ward V Board of County Comm'rs of Love County (1920) 40 Sct 419, 253 US 17, 64 LEd 751: Brinkerhoff-Faris Trust & Savings Co. V Hill (1930) 50 Sct 451, 281 US 673,

74 LEd 1107 - opportunity to be heard - 50 Sct at 454, 281 US at 681.

One of the most workable of all the general tests is found in the requirement that state courts afford a reasonable opportunity for asserting federal rights, without placing obstacles in the way. One case Davis V Wechsler (1923) 44 Sct 13 at 14 263 US 22 at 24-25, 68 L.Ed 143 states the following.

Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made is not to be defeated under the name of local practice ***. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right ***. If the Constitution and laws of the United States are to be enforced, this Court

cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds ***. This is familiar as to the substantive law and for the same reasons, it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.

What we have in this Probate Court is an effort to evade the command of Federal law, Demorest V City Bank Farmers Trust Co. (1944) 64 Sct 384, 388, 321 US 36, 42-43, 88 LED 526; with a state ground that has so little support of reason and precedent as to be "in effect" an evasion of Federal law. In Memphis Nat. Gas Co. V Beeler (1942) 62 Sct 857, 861, 315 US 649, 653-654, 86 LED 1090, that is, closing a probate estate when its executrix and the estate itself are still in litigation, this is highly very

irregular unprecedented and it is profoundly mandatory and credibly necessary that the Probate Court not be closed as the Probate Court ruled so that litigation demands may be responded to by the executrix. Until justice has been served there is absolutely no good reason to close said estate. The executrix filed two similar petitions to two different judges, the late Honorable William L. Galanes an experienced judge of many years who when he desired to and mostly ruled immediately and firmly but in said situation concerning the executrix's petition for a considerable length of time never ruled on said petition and unfortunately died quickly and suddenly from cancer. The judge knew the history from the commencement of the case and valued fairness and respected due process of law, for I well remember in his discussions of the first petition, quote "this man has

asked to be heard in this matter," and this petitioner was heard. He didn't mind that this Probate case was the oldest case in the Court if he could somehow assist in seeing that justice was being served, especially after reading a report on the condition of the testate. In the 1980 petition it was the first request by the executrix for a partial distribution, that is reasonable to understand since the executrix's family had inherited an estate in six figures from other sources and in contrast, this petitioner who has been disabled and unable to work since 1969. What is being said here that no one requested a partial distribution until 1980, so money is reality is not a desperate need of the executrix for if it was certainly demands would have been made earlier and therefore partial distribution or final distribution does not profess any substantial state ground.

Furthermore with the executrix in a petition for a new trial in Superior Court who is alleged with fraud upon the Court and extrinsic fraud and who in said Superior Court was in default for appearance for about 19 months in the same Motion for a new trial and also a separate Bill of Discovery and as far as this petitioner is concerned is not in a merited legal position to be awarded costs of administration and extraordinary awards because of lengthy litigation or any other reasons and the New Hampshire Supreme Court concurred, and in contrast a newly appointed Probate Judge with the same facts before him ruled discriminately against this petitioner and was certainly insensitive to all the prevailing facts which surrounds this case which a judge may take judicial notice of, Margaret Jean Vandervoort, Sams, Anderson, Alper and Post, P.A. and Alan R. Schwartz V

H. Carl Vandervoort Jr. 529 F2d 424. In such prevailing circumstances we find the unusual dichotomy of an experienced Probate Judge now deceased who taped his sessions on the initial petition, had heard this entire case from commencement and several other times, who did not rule on two matters (1) that executrix should be a trustee in 1977 and on (2) said petition and acknowledged one's request to be heard and a newly appointed Judge, who did not tape his session on the petition but was reminded to do so, at his first session on this case ruled negatively and discriminately against this petitioner, with the facts before him and a petitioner with many supplementary petitions attempted to fully inform the Court. From the above delineations it is reasonable that this petitioner cannot with any sincerity state an existence of an independent and adequate state ground as pro-

claimed from the history and pattern of the two petitions that were filed by the executrix. It is well to remember that the laws of the United States cannot be evaded by the forms of local practice, American Railway Express Company V Levee (1923) 44 Sct 11 at 13, 263 US 19 at 21, 68 LED 140 or put unreasonable obstacles in the way of asserting federal rights. Davis V Wechsler (1923) 44 Sct 13, 263 US 22, 68 LED 143.

What this argument is about are the essential elements of due process of law that is notice, and opportunity to be heard by testimony or otherwise and to defend in an orderly proceeding, that is the guarantee of the protection of a day in court, the benefit of the general law - that is a process of law of hearing before condemning that is not unreasonable arbitrary or capricious - to have the right of controverting by proof every

material fact which bears on the question of right in the matter involved - an implication that one must be brought within the jurisdiction by service of process to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, and in Clough V Moore 63 NH 111 we find that it is quote "a fundamental principle of law that judgment ought not to go against a party without an opportunity to make a defense *** for also a party ought not to be permitted to retain the fruits of a judgment to which he is not entitled, neither should he be compelled to submit to a judgment which unjustly concludes his rights without an opportunity to be heard," unquote.

Due process is due process it is no less in meaning whether it is criminal offense or a civil offense.

In reference to the case law in New

Hampshire whether or not in 1977 executrix executed the duties of a trustee rather than an executrix when selling securities, in McInnes V Goldthwaite et al, 94 NH 331, 52 A2d 795, 171 ALR 1414 it states quote "the duty of an executrix generally is not to retain and invest but to liquidate and terminate ***. If however a valid reason exists for the retention of a fund by the executrix it is encumbered upon her not to permit such fund to remain idle but to invest it. *** that an executrix owes the duty pending distribution to use usual prudent means to make estate productive of income, McInnes V Goldthwaite 96 NH 413, 77 A2d 849. Where there is considerable and unavoidable delay in settling up the estate and making final distribution as trustee the executrix may invest funds; for this duty may however be imposed on her to invest as may sometimes arise from the necessities of the

case.

In a brief statement equal protection of the laws ref. 14th amendment of United States Constitution enters the case where the Court did not fully exercise New Hampshire statutes RSA 554:25, RSA 564:14, RSA 567-A:4, RSA 554:8 and RSA 550:5.

Whether under a pendent jurisdiction in the sense of judicial power exists whenever there is a claim arising under the Constitution ***. United Mine Workers of America V Gibbs (1966) 86 S. Ct 1130, 383 US 715, 16 LED2d 218, or whether what we have is a matter in a Probate Court where the Federal equity jurisdiction cannot be limited by state law, Waterman V Canal-Louisiana Bank & Trust Co. (1909) 30 Sct 10, 13, 215 US 33, 45-46, 54 LED 80 or where the Probate Court had denied civil rights under the fifth and Fourteenth amendments to the Constitution, that is due process and equal protection of the

laws, such as under Title 42 section 1983 or whether this matter is envisioned from allegations of extrinsic fraud, Bassler V Arrowood (1974) 500 F2d 138 certiorari denied 95 Sct 796, 419 US 1116, 42 LED2d 815 , Lathan V Edwards (1941) 121 F2d 183, 184-185, and not the usual general rule in such matters, Byers V McAuly 13 Sct 906 at 908-910, 149 US 608 at 614, 615, 619, 37 LED 867, but similarly to Payne V Hook (1868), 7 Wall (74 US 425, 19 LED 260 where the administrator was charged with gross misconduct and having made false statements, and accomodated by the equitable remedial rights doctrine, this petitioner suggests to the Court whatsoever final doctrine it demands to reverse the present lower Probate Court's rulings, even prodding new Federal Probate Court procedures if necessary relative to the facts, it is essential that any lawyer representing others or other,

who may represent himself not be denied equal and fair treatment in any Court of law, that is, let the facts and the law rule, not obvious discriminating tactics as delineated in this case.

If the Probate Court allowed due process and was free from prejudice this petitioner could have argued successfully, the importance of not closing this case in Probate Court as it now is for as the estate and executrix are still in litigation, that this petitioner could have defended against said petition because of the doctor's testimony would delineate that this petitioner's efforts are not frivolous, immaterial and intended for delay.

Conclusion

The petition for a writ of certiorari should be granted for the decision below is palpably erroneous for due process is one of the most and of the many valuable

rights under our constitution. The case in Probate Court should be reopened and funds escheated or otherwise restored by summarily reversing the decision of the Court below, for this Court's action would merely reaffirm a doctrine and theory of decision which is unconstitutional on its face.

Respectfully submitted,

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